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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES J. STEIN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether an individual can constitutionally be denied a statutory promise of immunity from prosecution provided for one who effects a "voluntary surrender" of firearms to "a police officer" because he surrendered his firearms to one type of police officer, rather than another, and because he hoped that he might get them back sometime in the future, when that was impossible as a matter of law?

2. Whether the rule of lenity prohibits a court from construing a criminal statute strictly against an accused in a manner that completely frustrates the statute's plain purpose?

3. Whether a court of appeals violates procedural due process by deciding against a party an issue that had been neither raised nor briefed by the parties on appeal.

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OPINION BELOW

The split decision of the District of Columbia Court of Appeals upholding the trial court's denial of Stein's claim of immunity from prosecution is reported at 532 A.2d 641. (See Petitioner's Appendix ("Pet. App.") A, pp. 1a-23a, infra). The

rulings of the trial court that led to this appeal were issued orally from the bench. (See Pet. App. B, pp. 24a-26a, infra.)

JURISDICTION

The opinion of the District of Columbia Court of Appeals was entered on October 15, 1987. (See Pet. App. A, p. 1a, infra). A timely petition for rehearing or, in the alternative, for rehearing en banc was denied, the latter by a vote of 5-3, by an order dated January, 14, 1988. (See Pet. App. D, p. 28a, infra). The jurisdiction of this Court is founded upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law.

Section 6-2375 of the District Of Columbia Code provides:

§ 6-2375 Voluntary surrender of firearms, destructive devices, or ammunition; immunity from prosecution; determination of evidentiary value of firearm.

(a) If a person or organization within the District of Columbia voluntarily and peaceably delivers and abandons to the Chief any firearm, destructive device or ammunition at any time, such delivery shall preclude the arrest and prosecution of such person on a charge of violating any provision of this chapter with respect to the firearm, destructive device, or ammunition voluntarily delivered. Delivery under this section may be made at any police district, station, or central headquarters, or by summoning a police officer to the person's residence or place of business. Every firearm and destructive device to be delivered and abandoned to the Chief under this section shall be unloaded and securely wrapped in a package, and in the case of delivery to a police facility, the package shall be carried in open view. No person who delivers and abandons a firearm, destructive device, or ammunition under this section, shall be required to furnish identification, photographs, or fingerprints. No amount of money shall be paid for any firearm, destructive device, or ammunition delivered and abandoned under this section.

(b) Whenever any firearm, destructive device, or any ammunition is surrendered under this section or

pursuant to § 6-2320(c)(1), the Chief shall inquire of the United States Attorney and the Corporation Counsel for the District whether such firearm is needed as evidence: Provided, that if the same is not needed as evidence, it shall be destroyed.

STATEMENT

This is a case about the meaning of due process in this day and age in our nation's capital. The majority opinion in the court below ignored this critical constitutional concept as if it were a dead letter in the District of Columbia. It did so first by construing a statutory promise of immunity to a citizen who voluntarily surrenders illegal firearms to a police officer in such a crabbed and hypertechnical manner that a man who acted in good faith and did precisely that now faces the prospect of six years in jail and/or a $6,000 fine for his actions. No citizen seeking to comply with this statute of first impression would have dissected the statute as the majority did,

and thus one seeking such compliance -- like Stein -- was apparently doomed to be trapped by a poorly written statute interpreted in an unenlightened manner. Moreover, the majority reached this problematic solution despite the fact that its interpretation completely undermined the undeniable purpose of the statute it was construing. With the reasonable alternative construction proffered by the dissent so readily available to fulfill -- rather than frustrate -- the statute's purpose, the constitutionally-based rule of lenity compelled a different result. Finally, the majority's cavalier attitude toward due process also led it to reach out and decide against petitioner an issue that had never been raised or briefed by the parties on appeal. Plainly, due process requires more on each score.

Due process, of course, is a variable concept, depending heavily on the facts

for its meaning in any given setting. It is to the facts of this case, which are basically undisputed (see Pet. App. A., p. 2, n.5, infra), that we now turn.

1. The Council Of The District Of Columbia Enacts A Statute Granting Immunity From Prosecution For Firearms Offenses To Anyone Who Voluntarily Surrenders Illegal Firearms

In 1976, the Council of the District of Columbia ("the City Council") enacted a Firearms Control Act in order "to reduce the potentiality for gun-related crimes and gun-related deaths occurring in the District of Columbia." (Pet. App. A, p. 19a, infra). One of the provisions of this comprehensive statutory scheme provided as follows:

> **§ 6-2375 Voluntary surrender of firearms, destructive devices, or ammunition; immunity from prosecution; determination of evidentiary value of firearm.**
>
> (a) If a person or organization within the District of Columbia

> voluntarily and peaceably delivers and abandons to the Chief any firearm, destructive device or ammunition at any time, such delivery shall preclude the arrest and prosecution of such person on a charge of violating any provision of this chapter with respect to the firearm, destructive device, or ammunition voluntarily delivered. Delivery under this section may be made at any police district, station, or central headquarters, or by summoning a police officer to the person's residence or place of business. Every firearm and destructive device to be delivered and abandoned to the Chief under this section shall be unloaded and securely wrapped in a package, and, in the case of delivery to a police facility, the package shall be carried in open view. No person who delivers and abandons a firearm, destructive device, or ammunition under this section, shall be required to furnish identification, photographs, or fingerprints. No amount of money shall be paid for any firearm, destructive device, or ammunition delivered and abandoned under this section.

The City Council enacted this provision against the backdrop of a body of well-established local caselaw providing an affirmative defense to a weapons charge for one who possesses a pistol "for the purpose of turning it over to law

enforcement authorities." D.C. Criminal Jury Instruction No. 4.815B (emphasis added). 1/

Shortly after the enactment of this statutory provision, the District of Columbia Court of Appeals had occasion to consider it and ruled that it "provides immunity for one who surrenders or delivers a weapon." Kuhn v. Cissel, 409 A.2d 182, 187 (D.C. App. 1979). The Kuhn Court also ruled that persons who so surrender weapons "are not entitled to recover possession" at any point in the future. Id. at 187-188.

1/ The criminal procedure chapter of the D.C. Code defines "law enforcement officer" to mean "an officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia, or an investigative officer or agent of the United States." D.C. Code § 23-501(2) (emphasis added).

2. Stein Travels Into The District Of Columbia Briefly, Voluntarily Discloses And Surrenders Two Unloaded Firearms To Police Authorities And Is Nonetheless Charged With Criminal Firearms Offenses

Petitioner Charles J. Stein, Jr. ("Stein") is a 47-year old resident of the State of California. (R. 174). 2/ He is married and has four children. He is a retired Captain of the San Fernando Police Department who currently supports himself and his family by working as a security specialist and private investigator. (R. 174). He is licensed in the State of California to use guns and to carry concealed weapons. (R. 174). He has never been convicted of any criminal offense. (R. 174).

On the evening of January 6, 1986, Stein flew from California to Virginia on official business. (R. 174-175). The

2/ All "(R. ___)" citations are to the record certified in the court below.

business was to accompany Senator Edward M. Kennedy beginning the next day on a thirteen-day long trip, sponsored by the United States Senate, to examine the problems of economic debt in various countries in South America. (R. 174-175). This officially sponsored South American tour included some spots of well-recognized danger -- such as Santiago, Chile and Lima, Peru -- and, accordingly, Stein was hired to ensure the security of the trip. (R. 174-175). Stein had worked for the Senator in this capacity for over fourteen years, including accompanying the Senator on his highly publicized trip to South Africa the year before. (R. 174). As with the South African trip, Senator Kennedy's office had arranged for Stein to be permitted to carry weapons in all the South American countries that the Senator's party would be visiting. (R. 174-175).

After arriving at Dulles International Airport on the evening of the 6th, Stein traveled to Senator Kennedy's house in McLean, Virginia, where a briefing concerning the trip was to be held the next morning and from where the Senator's entourage was to depart for the airport to begin the trip. (R. 175). A detailed briefing was held the next morning as planned, but the departure plans changed because the Senator had to perform some last-minute duties on Capitol Hill. (R. 175). The revised plan called for the traveling party to depart for the airport from the Senator's office, rather than his home. (R. 175). As a result, at approximately noon, Stein and one of the Senator's aides left the Senator's home to travel by car to the Senator's office to assemble the traveling party, and then to travel from there to the airport. (R. 175). Stein brought with him the two

handguns he needed to perform his security function on the trip. These weapons were unloaded, separated and secured, with ammunition, in a small canvas bag. (R. 175-176).

Upon arriving at the Russell Senate Office Building, Stein and the Senator's aide discussed what should be done with the weapons that Stein had brought with him while they were in the Russell Office Building getting everybody ready to depart for the airport. (R. 175-176). Stein and the aide, who is a lawyer, decided that the best and safest course of action was to bring the guns and ammunition into the building and to leave them at the guard's desk while they were organizing the trip to the airport. (R. 175-176). Accordingly, upon entering the building, Stein went to the guard's desk, identified himself as a security officer with Senator Kennedy, declared having possession of two

unloaded guns, and the ammunition for them, in his canvas bag and asked to leave it all at the desk. (R. 176). Upon doing so, Stein was asked by the guard -- a Capitol Police Officer -- whether he had licenses to carry his two weapons in the District of Columbia. (R. 176). Stein responded that he did not possess such licenses in the District, but did in California, and briefly explained his limited reasons for being in the city at all that day. (R. 176). His explanations notwithstanding, at approximately 12:30 p.m., Stein was arrested. (R. 176).

At approximately 4:30 p.m. that same afternoon, Stein was arraigned on four misdemeanor weapons charges: one count of carrying a pistol without a license in violation of D.C. Code § 22-3204; two counts of possession of unregistered firearms in violation of D.C. Code § 6-2311(a); and one count of possession of

unregistered ammunition in violation of D.C. Code § 6-2361. (R. 115-116). After entering pleas of "not guilty" to these charges, Stein was released on his own recognizance to accompany Senator Kennedy to South America. (R. 118). After returning from South America, Stein was further arraigned on two additional misdemeanor offenses arising from these same facts: two counts of possession of prohibited machine guns in violation of D.C. Code § 22-3214(a). (R. 125-126). 3/

3. Stein Moves To Dismiss The Charges Against Him On The Basis Of The Statutory Immunity, A Hearing Is Held And His Motion Is Denied

Because of the forthcoming and voluntary nature of his actions in

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3/ These machine-gun charges were brought because it appeared that Stein's firearms had the capability of holding more than twelve bullets at a time, not because they shot more than one bullet with a single pull of the trigger which they were not capable of doing. See D.C. Code § 6-2302(10).

disclosing and delivering his firearms to police authorities, Stein promptly filed a motion to dismiss the criminal charges against him on the basis of the immunity from prosecution provided by the "voluntary surrender" statute, Section 6-2375 of the District of Columbia Code (R. 127-134). The prosecutor opposed Stein's claim of immunity arguing briefly that Stein "did not 'deliver and abandon' his weapons in the manner contemplated by the statute" and consequently was "not entitled to immunity under the statute." (R. 151-152). Stein filed a reply memorandum contesting each of the prosecutor's points, and the motion was set for hearing. The hearing on Stein's motion spanned two days and, to the knowledge of counsel and the court, presented a question of first impression under the "voluntary surrender" statute.

On the first day of oral argument on Stein's motion, the trial court sua sponte questioned whether a Capitol Police Officer was a proper police officer to surrender a weapon to under this statute, apparently thinking the statute only applied to members of the Metropolitan Police Department ("MPD") (Tr. 6-13). 4/ Faced with this new issue, Stein's counsel offered "two points," (Tr. 7), in response. First, he argued

> that for these purposes, the Capitol Police would have to be considered an agent of the Metropolitan Police Department. [5/] They are authorized by statute, D.C. Code Section 9-115.1, to protect congressional people in the Capitol. And I think that the Congress, which enacts laws for both the United States and the District, undoubtedly thought that Metropolitan

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4/ All "(Tr. ____)" citations are to the transcribed record of the hearing held on Stein's motion on March 26-27, 1986.

5/ Another section of the Code defines the term "Chief, which is used in Section 6-2375, to include any "designated agent" of the Chief of the MPD.

> Police and the Capitol Police would merge in terms of protecting people in the Capitol . . . It's incredibly unreasonable to say Mr. Stein is going to face six years in jail because he picked the wrong police officer to turn his firearms over to.

(Tr. 9-10). Second, counsel argued that the statute had to be "read . . . at the same time with the general prohibition against reading penal statutes unduly strictly. If you look at the statute -- [it says] delivery under this section may be made to any police district station, or central headquarters or by summoning a police officer to a person's residence or place of business' . . . there may be enough ambiguity in there to allow him to do what he did." (Tr. 11). 6/ Finally on the first day of the hearing, the

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6/ Stein's counsel buttressed this claim of facial ambiguity by referring the trial court to the caselaw defense for surrendering weapons to law enforcement authorities "which does not go into the specifics . . . about who they are to be delivered to." (Tr. 11-12).

prosecutor argued that the statute required "the abandonment of the weapons" and "that the defendant did not in fact abandon his weapons" but merely attempted "a bailment" of them. (Tr. 41).

Before the resumption of the hearing the next day, Stein's counsel called the MPD to determine whether the Capitol Police were designated agents of the MPD for purposes of the voluntary surrender statute. Upon doing so, counsel was told the following by three different individuals: "I think so, but I'm not really sure;" "I don't know;" and "I don't know." (Tr. 67). When the hearing resumed, counsel for Stein reiterated the "constitutional principle that ambiguity concerning the reach of criminal statutes has to be resolved in the defendant's favor," (Tr. 66), and argued that the "unavailability of the [requested] information [concerning agency] only

heightens the ambiguity" previously discussed under the statute (Tr. 67). "Under the due process cases," counsel argued, "[Stein] should be given the benefit of the doubt." (Tr. 69). Finally, with respect to the prosecutor's abandonment argument, counsel argued -- under the authority of Kuhn v. Cissel, supra -- that it "would be a meaningless requirement because you can't get guns back from the police once you give them" (Tr. 85), and also that the verb "abandon" had other meanings that were fully satisfied under the facts of this case. (Tr. 85-86).

At the conclusion of the hearing, the trial judge remained concerned about two aspects of Stein's compliance with the statute. First, he believed that the statute did not permit Stein to surrender his weapons to a Capitol Police Officer, but only to a Metropolitan Police

Officer. (Pet. App. B, pp. 24a-25a, infra). Second, he believed that the statute required an intent to forever abandon the weapon at the moment of its surrender and that Stein had no such intention. (Pet. App. B, pp. 25a-26a, infra). On these two grounds alone, the judge rejected Stein's claim to immunity and his motion to dismiss.

4. Stein Appeals The Denial Of His Motion, And The Trial Court's Ruling Is Affirmed By A Bitterly Divided Court

After hearing the trial judge's ruling Stein's counsel immediately informed the trial court that:

> we think we have a right to appeal right now from that ruling. That, as Your Honor know[s], that's a provision that provides immunity from prosecution. That is like the speech or debate clause in the Constitution, the double jeopardy clause. The right at issue is a right not to be tried. That right will be irreparable lost if we go to trial. We're going to notice an appeal.

(Tr. 106). The trial judge responded "You do have a right to appeal," (Tr. 106), and on April 17, 1986, Stein filed a notice of his intention to appeal to the District of Columbia Court of Appeals. (R. 177). Shortly thereafter, the prosecutor moved to dismiss Stein's appeal for lack of subject matter jurisdiction arguing that the immunity ruling at issue was not part of the limited category of cases falling within the "collateral order" exception. But the court of appeals unanimously agreed with Stein that it was in fact precisely such a "collateral order," (Pet. App. A, pp. 4a-8a, infra), and that an interlocutory appeal was proper because Stein's "asserted right to [immunity will be] forever lost if not resolved in [his] favor before jeopardy has attached." (Id. at 8a).

On the merits, Stein continued to press his claim that the statute lacked

"definitional clarity" since the Firearms Control Act "nowhere define[d] the term 'police' so as to limit its meaning in Section 6-2375 to members of the Metropolitan Police Department." Brief For The Appellant ("Br.") at 14-15. 7/ Stein also argued again that the Capitol Police had to be considered authorized agents of the MPD for these purposes because

> the Capitol Police have been authorized by local statute to make arrests for the very firearms offenses at issue herein, see D.C. Code § 9-115.1, and have been designated as exclusive law-and-order custodians of Capitol buildings, like the Russell Senate Office Building. See D.C. Code § 9-115; 40 U.S.C. § 212a. Certainly, a police officer who has been officially, indeed exclusively, designated as an agent of the state for purposes of making arrests under the firearms law in these limited circumstances should have his agency

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7/ By way of contrast, Stein pointed out that a different chapter of the District of Columbia Code did define police to mean, for its purposes, members of the MPD. See D.C. Code § 6-2101.

> status carried over into effecting compliance with other interrelated provisions of those very same firearms laws in the same limited circumstances. Even if his actual authority must for some reason stop short of this point, his apparent authority in this regard cannot be questioned. By all appearances, a Capitol Police Officer can only be considered an authorized recipient for delivery under Section 6-2375.

Br. at 16.

Next, Stein argued that

> [t]here was no question in the trial court that Stein had the intentin of abandoning his weapons to the Capitol Police until he was ready to leave the Russell Senate Office Building and the District of Columbia. (R. 174-176). [and that] . . . there is no need to require any more of an abandonment that Stein offered in order to fulfill the purpose of the statute. Cf. D.C. Code § 6-2320(c)(2) (if firearm registration application is rejected, applicant has seven days to remove firearm from District of Columbia). The firearms laws at issuer herein are aimed at preventing the improper use of firearms in the District of Columbia; an individual's abandonment of his weapons until he is ready to leave the District of Colunbia achieves the same salutary result.

Br. at 16-17. [8/] Stein also repeated his argument that, in any event, a complete

abandonment had been achieved as a matter of law the moment he surrendered his weapons. See Brief at 17-18.

After receiving further briefs and hearing oral argument, on October 15, 1987, the District of Columbia Court of Appeals rendered its decision. (See Pet. App. A, pp. 1a-23a, infra). By a 2-1 vote, with Judges Terry and Rogers in the majority, that court affirmed the trial court's denial of Stein's claim of immunity. The majority basiclaly agreed with the trial court's ruling lock, stock and barrel. In a sharply worded dissent,

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8/ In addition to fully fulfilling the goal of the statute, Stein argued that giving such a temporal, rather thaneternal, focus to the abandonment requirement also perfectly accords with the definition of abandon. The second definition of that verb in Webster's Third International Dictionary is simply: "to give up by leaving." (Tr. 86). To be a verb, therefore, the term need not necessarily have an infinite time component to it; to be a fully effective part of the statute, it need not either.

however, Judge Julia Cooper Mack demonstrated how "the majority's resolution of ambiguous terms in D.C. Code § 6-2375(a) (1981) leads to absurd consequences and thwarts the manifest purpose of the statute." (Pet. App. A, p. 15a, infra). With scholarly precision, Judge Mack also proved how the alternative statutory interpretation proffered by Stein was both reasonable and fully in keeping with the statute's purpose. Finally, Judge Mack poignantly noted that the net effect of the majority's ruling was a violation of due process:

> To hold out a promise of immunity to citizens surrendering their firearms only to renege on that promise based on a narrow construction of ambiguous statutory language puts this court in danger of collaboratin gin the 'sanction [of] the most indefensible sort of entrapment by the State -- convicting a citizen for exercising a privilege which the State clearly had told him was available to him.' Raley v. Ohio, 360 U.S. 423, 438 (1969); accord, Cox v. Louisiana, 379 U.S. 559, 571 (1965).

(Pet. App. A, pp. 22a-23a, infra).

5. Stein Petitions For A Rehearing En Banc Which Is Denied By A Vote Of 5-3, But The Court Of Appeals Holds Its Mandate So That Relief Could Be Sought In This Court

Because of the sharp dispute between the majority and the dissest over Stein's entitlement to the statutory immunity, Stein petitioned for a rehearing en banc of the appeal. In doing so, Stein highlighted that the majority opinion had (1) completely ignored the facts that Capitol Police were statutorily designated as exlcusive law-and-order officers in the Russell Senate Office Building and that an abandonment of Stein's weapons had occurred as a matter of law the moment he surrendered them (Appellant's Petition For

Rehearing Or, In The Alternative, For Rehearing En Banc ("Petition") at 3-7, (2) totally frsutrated and undermined the purpose of the voluntary surrender statute (id. at 9), and (3) incorrectly decided against Stein an issue that had never been fbrief by the parties. (Id. at 7-9). Stein's petition concluded with the observation that the majority opinion had simply failed in its "obligation to do more than blindly follow general statutory language wherever it might lead in an individual case." (Id. at 10).

Upon initial consideration of Stein's petition, the court of appeals ordered the prosecutor to prepare and file a response to it. (See Pet. App. C, p. 27a, infra). Upon further consideration, the full court voted 5-3 to deny the petition. Judges Mack, Newman and Ferren would have granted the petition for rehearing en banc. Thereafter, upon

Stein's motion, the court of appeals agreed to hold its mandate so that Stein could seek relief from this court before having to return to the trial court. (See Pet. App. E, p. 29a, infra).

REASONS FOR GRANTING THE WRIT

The undisputed facts of this case are, to say the least, compelling. When an individual decides that his "best and safest course of action," (R. 175-176), upon entering the District of Columbia is to voluntarily disclose and surrender his firearms to a police officer, rather than leave them in a car, while he is attending to his business in the District, it is difficult to see why any rational system of law enforcement should feel that criminal punishment is warranted. By enacting Section § 6-2375 of the D.C. Code -- entitled "Voluntary surrender of firearms, destructive devices, or ammunition; immunity from prosecution . .

." -- the City Council made a general determination that it should not be and, indeed, that such safety-conscious actions should be encouraged in the District. With an overly stringent interpretation reminiscent of the rigid formalities of the early common law, however, the majority in the court below has held that Stein was not entitled to the protection of Section 6-2375 -- and could instead be prosecuted for six separate criminal offenses -- because he surrendered his weapons to the wrong police officer at the wrong place without intending to forfeit those weapons forever. As Judge Mack accurately pointed out in dissent, this is "an absurd and harsh result," (Pet. App. A, p. 22a, infra), that will actually undermine the purpose of Section 6-2375 by discouraging individuals from being as forthcoming as Stein was in the future.

The majority opinion is the very

first construction ever of Section 6-2375. In a city that attracts as many visitors as this one does, the construction of this statute which purports to give people a non-criminal (and safety-conscious) option for the handling of firearms in the District, is undeniably a matter of substantial importance. See, e.g., "Bodyguard's Gun Charges To Stand," Washington Post, p. B3 (October 16, 1987). To be sure, this Court "has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern," Pernell v. Southall Realty, 416 U.S. 363, 366 (1974), but that general reluctance does not apply when, as here, "a constitutinal claim" is present. Id; accord, Boos v. Barry, No. 86-803. That reluctance should also not apply when the local statute at issue can so profoundly affect individuals from all

over the country, and has such a direct and dramatic effect in exclusively federal buildings, like the Russell Senate Office Building and indeed this very courthouse. When all these factors are considered together, the traditional reluctance should give way to an actual affirmative interest in reviewing this matter.

I. By Rejecting Stein's Claim Of Statutory Immunity On The Basis Of The Particular Police Officer He Happened To Pick To Surrender His Weapons To And The Legally Unfulfillable Intention He Harbored At The Moment Of Such Surrender, The Court Below Sanctioned A Constitutionally Indefensible Sort of Entrapment By The State

In Raley v. Ohio and Cox v. Louisiana, this Court reviewed and reversed local state criminal cases for violating due process by convicting a citizen for exercising a privilege that the state had told him was available. The principle behind those decisions is fully

applicable here for the following reasons. First, Section 6-2375 provides, on its face, for delivery of weapons under it to be made to "a police officer." (Pet. App. A, pp. 8a-9a, infra). The plain breadth of this language [9] told Stein that he could surrender his firearms to a Capitol Police Officer. To avoid this conclusion, the majority turned to another definitional section of the statute, which does not even define the term in question, and then to a single

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[9] As one court has ruled

> The term 'police' as commonly understood, is so plain and unambiguous that there is no occasion for resorting to rules of statutory interpretation and the Court has no right to look for or impose another meaning . . . 'Police' is defined: 'An organized civil force for maintaining order, preventing and detecting crime, and enforcing the laws.'

Wyndham v. United States, 197 F.Supp. 856, 859 (E.D.S.C. 1961).

statement in its legislative history, to determine that Section 6-2375's "authorized recipient [is] the 'Chief' or his designated agent which includes only the Metropolitan Police." Pet. App. A, p. 11a, infra. While the legislative history actually nowhere so limits the possible "designated agents" for such delivery, 10/ the salient point for present purposes is that such an intricate process of interpretation had to be conducted at all. Due process does not require citizens to perform such intricate parsing; it entitles them to rely on the

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10/ The legislative history relied upon, (see Pet. App. A, pp. 9a-10a, infra), is an express sectional reference to Section 6-2375 of the Firearms Control Act. The term "designated agent" is not set forth in that section f the Act, however, but appears instead in Section 6-2302 of the Act, whose legislative history is unenlightening. Contrary to the majority's conclusion , therefore, the "designated agent" provision of the statute is not restricted to members of the Metropolitan police force.

apparent language of the law.

What makes the due process flaw in the foregoing point all the more patent is its juxtaposition with the facts that the Capitol Police have authority to make arrests for the very firearm offenses sought to be protected against by Section 6-2375's grant of immunity [11] that the Capitol Police have been designated as exclusive law-and-order-custodians of the Russell Senate Office building. See D.C. Code § 9-115; 40 U.S.C. § 212a. [12] No

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11/ See Pet. App. A, p. 16a, infra ("under the reasoning advanced by the majority, Mr. Stein has been placed under arrest for possessing unregistered firearms by officers who could not themselves legally receive into their possession the firearms turned over to them.") Accord, Martin v. Malhoyt, No. 86-5561, slip op. at 27-29 (D.C. Cir., 1987) (holding that similar federal police officers act at times in a "District of Columbia law enforcement capacity").

12/ Under these governing statutes, a Metropolitan police officer could only lawfully enter the Russell building "with the consent or upon the request of the Capitol Police," id., and thus, a Capitol (Cont'd)

matter what one thinks of the ultimate merits of Stein's arguments that these provisions made the Capitol Police agents of the MPD as a matter of law, it surely cannot be gainsaid that Section 6-2375's use of the broad term "police officer," combined with the unique nature of the Capitol Police's power and authority in the Russell Senate Office building, sufficed to give all the appearances of appropriate authority under Section 6-2375 to the Capitol Police Officer on duty when Stein surrendered his weapons. The majority bypassed this "apparent authority" argument as if it was a matter

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Police Officer legally had to be involved in the surrender of Stein's weapons to some degree. Importantly, the degree of that involvement is only a function of the extent to which that police unilaterally chooses to exercise this exclusive authority, which actually empowers him therefore -- under the majority's interpretation -- to veto entirely the applicability of Section 6-2375 within Capitol buildings by simply refusing to allow entry to Metropolitan police officers.

of small concern, 13/ but without any prior caselaw interpreting this statute, the argument easily rises to constitutional proportion. A citizen confronting these facts could only reasonably believe that in the Russell Senate Office building a surrender of his weapons to a Capitol Police Officer was perfectly proper.

Second, the majority's strict construction of the statutory verb "abandon" 14/ equates to a requirement

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13/ Compare Pet. App. A, p. 18a & n.2, infra.

14/ Despite its mistaken reliance on a single statement in the legislative history to interpret the term "police officer" under the statute, (see Pet. App. A, pp. 9a-11a; compare id. at 18-19) the majority completely failed to consider three separate statements form the same legislative history that plainly contradict its strict interpretation of the meaning of "abandon" in the statute. See id. 21a-22a. Although never explained, this failure was presumably because of the allegedly "plain meaning" of the term. As Judge Mack highlighted, however, the meaning of "abandon" is not (Cont'd)

that weapons surrendered under Section 6-2375 be forfeited to the police. Accord, Pet. App. A, p. 21a n.5, infra. Although we disagree with this requirement, the majority's decision to impose it completely ignored the fact that such a forfeiture was effected as a matter of law the moment Stein surrendered his weapons. Taking the Government's allegations as true, Stein's weapons were technically "machine guns" under District of Columbia law, (see R. 125-126), and as

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as plain as the majority claimed. See id. at 20a; accord, Webster's Third New International Dictionary, p. 2 ("abandon" defined in part as simply "to give up by leaving"). But even if it were, that does not necessarily end the inquiry. "[T]he 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned," Wilderness Society v. Martin, 479 F.2d 842, 955 (D.C. Cir. 1973) (en banc) (emphasis added), and should never be overindulged to create an absurd result. See Pet. App. A, pp. 20a-21a, infra; accord, American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982). The majority overlooked these principles and simply stopped too early in its construction of this statute.

such were prohibited contraband subject to forfeiture and destruction upon their discovery. See D.C. Code §§ 22-3214 & 22-3217. Since the weapons were such "contraband [Stein] was not entitled to have [them] returned to him." United States v. Jeffers, 342 U.S. 48, 54 (1951); accord, Kuhn v. Cissel, 409 A.2d at 187-188. The majority bypassed this point because it renders their construction of the abandonment requirement meaningless. The law should never be interpreted to require, and a citizen should never be held liable for failing to effect, the performance of a useless act. See United States v. American Trucking Association, 310 U.S. 534 (1940). 15/ In Raley, this

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15/ Accord, Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987); National Bank of Elizabeth, New Jersey v. Smith, 591 F.2d 223, 231 (3d Cir. 1979); Marlin v. Cardillo, 95 F.2d 112, 115 (D.C. Cir. 1938); Mulky v. United States, 451 A.2d 855, 857 (D.C. App. 1982).

Court found a due process violation where the state had given an accused the "impression" that his acts were lawful, 360 U.S. at 437, and in Cox the Court found the same when the accused had been "in effect" told the same. 379 U.S. at 571. The principle of due process underlying these cases does not require a crystal clear and unimpeachable directive from the state; presumably, no one would ever be prosecuted in such a circumstance. What Raley and Cox require is that it was reasonable for the citizen to act as he did in reliance upon the state's pronouncement. Here it plainly was, and due process requires that this litigation proceeding he brought to an end.

II. The Constitutionally-Based Rule Of Lenity Should Have Prohibited The Court Below From Harshly Construing A Criminal Statute Against The Accused In A Manner That Completely Frustrates The Statute's Plain Purpose

"'[I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words will be used, but will take in connection with it the whole statute . . . and the objects and policy of the law.'" Stafford v. Briggs, 446 U.S. 527, 535 (1980). The majority in this case did exactly what has been "well settled" should not be done. It failed to give proper considering to the whole statute in interpreting the particular clauses before it, 16/ and also failed to

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16/ For example, other sections of the Firearms Control Act expressly reveal the legislators' belief that permitting individuals to take their weapons out of the District of Columbia was a fully effective means of fulfilling the act's goal of public safety within the District of Columbia. See D.C. Code § 6-2320(c)(2) (Cont'd)

give any consideration whatsoever to "the objects and policy" of Section 6-2375. Indeed, the majority did not even bother to dispute the dissent's telling analysis that (Pet. App. A, pp. 19a-20a, infra):

> [t]he public policy behind § 6-2375 is obviously to encourage individuals to surrender firearms to responsible police authorities so that those firearms will not be used in the District of Columbia. Nothing which

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(if firearms registration application is rejected, applicant has seven (7) days to remove unregistered firearm from District of Columbia); D.C. Code §6-2346(c)(3) (if firearm dealer's license is rejected, applicant has forty-five (45) days to remove unregistered firearms and ammunition from District of Columbia). These sections thus support the interpretation of an abandonment requirement limited to the length of time the individual possessing the weapons desires to remain in the District. See United States v. Witkovich, 353 U.S. 194, 199 (1957) ("[a] restrictive meaning for what appears to be plain words may be indicated by the Act as a whole").

Stein did would undermine that purpose. In fact, prosecuting Stein for choosing the wrong police officer to surrender his weapons to only works to discourage other citizens from being so forthcoming in the future.

This Court has frequently noted the "well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute," Bob Jones University v. United States, 461 U.S. 574, 586 (1983), and has cautioned lower courts "to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Watt v. Alaska, 451 U.S. 259, 266 n.9 (1981). In the context

of this case, these are more than mere exhortations of general construction jurisprudence, they are clear guideposts to the constitutinal failing of the majority decision. The constitutinally based rule of lenity requires criminal statutes to be read favorable to the accused when reasonably possible. Effecting the purpose of the statute is one reasonable reason for doing so, but unfortunately it is a reason that was ignored in the court below.

III. The Court Below Violated The Most Basic Principle Of Procedural Due Process By Deciding Against Stein An Issue That Had Been Neither Raised Nor Briefed By The Parties On Appeal

The majority buttressed its statutory analysis against Stein holding that the "guard desk in the Russell Senate Office Building, which is in a public hallway just inside the entrance," (Pet. App. A,

p. 11a, infra) could not be considered his "place of business" in the District of Columbia within the meaning of Section 6-2375(a). See id. The "place of business" analysis, however, is not properly directed to he guard desk particularly, but rather to the building generally: "As Senator Kennedy's employee, the Russell Senate Office Building was plainly Stein's 'place of business' in the District of Columbia on January 7, 1986.'" (Pet. App. A, p. 22a n.6, infra, (emphasis added). Is each judge of this Court's "place of business" only his own chambers, or is it the Supreme Court generally?

Moreover, this "place of business" question was neither ruled upon by the trial court nor briefed by the parties on appeal. 17/ It is well-settled that

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17/ Stein's "place of business" was only mentioned once, in passing, in the entire course of the lengthy briefs filed by the parties. See Reply Brief For The (Cont'd)

absent extraordinary circumstances an appellate court should not rule upon issues that have not first been properly addressed by the parties. See Hormel v. Helvering, 312 U.S. 552, 556 (1941) (this rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.") Even if the question is not one of fact, so "there there is no such evidence, [a party] should have the opportunity to present whatever legal arguments he may have in defense." Singleton v. Wulff, 428 U.S. 106, 120 (1976). The majority thus clearly erred in ruling upon this issue at all, and its decision to do so only too clearly

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Appellant at 12 n.12.

reflects the casual attitude toward due process that fatally infects its entire decision.

Finally, presumably even the technical-minded majority would have recognized Senator Kennedy's own office within the Russell Senate Office Building as Stein's "place of business" in the District of Columbia, and would therefore have allowed him to voluntarily surrender his weapons under the statute in the Senator's office. Stein likely could never have gotten his weapons to the Senator's office, however, because the metal detector employed at the guard desk near the entrance to the building, would have alerted the Capitol Police officer on duty to their existence and caused him to stop Stein. If that happened, then Stein could hardly claim that any subsequent surrender of his weapons was "voluntary;" by surrendering his weapons first to

ensure the required voluntariness, however, he is automatically defaulted on "place of business" grounds. The majority has thus constructed a perfect "Catch-22" that will apply to trap anyone who works in a building guarded by such security.

CONCLUSION

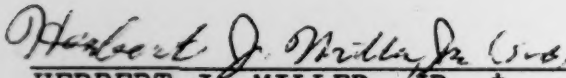
There are a number of attractive aspects to conducting further review of this case in this Court. First, the facts are undisputed so there are nothing but questions of law to be decided. Second, the statutory construction issue is one of first impression so these questions of law can be decided against a clean backdrop, and put to rest forever now. Third, an important question of public policy -- encouraging visitors to this tourist mecca to surrender any firearms they might bring with them to law enforcement authorities in the District while they are here -- hangs in the balance with the decision.

At the bottom of it all, however, lies the principle of due process.

Petitioner fully recognizes that this Court does not sit merely to correct erroneous decisions by lower courts. This Court does sit, however, to reaffirm and revitalize the constitutional principles that are the essence of individual liberty. This Court has done so throughout the years by reviewing state criminal cases when the state has crossed over the constitutional line. There will never be a better, nor more necessary, occasion for reaffirming and revitalizing the principle of Raley and Cox than this

case. For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member in good standing of the Bar of this Court and that I caused three copies of the foregoing Petition For A Writ Of Certiorari To The District of Columbia Court of Appeals to be sent by first-class mail, postage prepaid, this 14th day of March 1988 to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Herbert J. Miller, Jr.
HERBERT J. MILLER, JR.

APPENDIX A

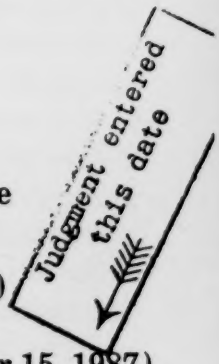
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 86-776

CHARLES J. STEIN, JR., APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court of the District of Columbia

(Hon. Shellie F. Bowers, Trial Judge)

(Argued April 14, 1987 Decided October 15, 1987)

Stephen L. Braga, with whom *Herbert J. Miller, Jr.*, and *William W. Greenhalgh* were on the brief, for appellant.

Laura Ross Blumenfeld, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, and *Michael W. Farrell*, *Kenneth W. Cowgill*, and *Silvia L. Gonzalez*, Assistant United States Attorneys, were on the brief, for appellee.

Before MACK, TERRY, and ROGERS, *Associate Judges*.

Opinion for the court by *Associate Judge* TERRY.

Opinion by *Associate Judge* MACK, concurring in part and dissenting in part, at p. 15.

TERRY, *Associate Judge*: Appellant Stein was charged with one count of carrying a pistol without a license,[1] two counts of possession of an unregistered firearm,[2] one count of possession of ammunition without a registration certificate,[3] and two counts of possession of a prohibited weapon.[4] Stein moved before trial to dismiss all of these charges, asserting *inter alia* that he was immune from prosecution under D.C. Code § 6-2375(a) (1981). The motion was denied after a hearing, and Stein noted this appeal. The government has moved to dismiss the appeal for lack of jurisdiction. We hold that we have jurisdiction to decide the immunity issue, and to that extent we deny the government's motion. We agree, however, that we lack jurisdiction in this pre-trial appeal to consider the other issues which Stein raises. On the merits of the immunity question, we hold that Stein is not immune from prosecution, and thus we affirm the trial court's ruling.

I

Charles Stein, a retired police captain from California, now works as a security specialist and private investigator.[5] On several occasions, beginning in the early

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[1] D.C. Code § 22-3204 (1981).

[2] D.C. Code § 6-2311 (a) (1981).

[3] D.C. Code § 6-2361 (3) (1981).

[4] D.C. Code § 22-3214 (a) (1981). All of the charges (except the ammunition charge) appear to be based on Stein's possession of the same two firearms.

[5] The facts pertinent to this appeal are essentially undisputed. Our factual summary is based largely on Stein's own affidavit, which was filed in the trial court and is part of the record on appeal, on Stein's motion to dismiss and its supporting memorandum, and on the transcript of the hearing on that motion.

1970's, he has performed various professional services for Senator Edward M. Kennedy. In the latter part of 1985 he was asked to travel with Senator Kennedy on a thirteen-day tour of South America and to ensure the Senator's protection throughout the trip, beginning in January 1986.

On January 6 Stein flew from his home in California to Dulles International Airport in Virginia to meet with the Senator and his entourage in preparation for the South American trip. From the airport Stein went to Senator Kennedy's home in McLean, Virginia, where a briefing conference was to be held the next morning. Originally it had been expected that the traveling party would go directly to the airport from the Senator's home. However, because the Senator had some last-minute business to do at his office on Capitol Hill, the departure plans were changed; it was agreed that everyone would leave from the Senator's office in the District of Columbia.

On January 7 Stein went with one of the Senator's aides by car to Capitol Hill. Stein was carrying with him two guns which he intended to take with him to South America in his capacity as a bodyguard on the trip. The weapons were unloaded, separated, and secured in a small canvas bag, along with a quantity of ammunition. Before entering the Russell Senate Office Building, where Senator Kennedy's office was located, Stein and the Senator's aide discussed what should be done with the weapons. They both agreed that the best thing to do would be to bring the weapons and ammunition into the building and leave them at the guard's desk while the two of them visited the Senator's office.

Stein entered the building, approached the Capitol Police officer's desk just inside the entrance, and identi-

fied himself as a security officer for Senator Kennedy. He told the officer that he had two unloaded guns and some ammunition in the bag and asked permission to leave them at the officer's desk. The officer asked whether Stein had a license to carry his weapons in the District of Columbia. Stein replied that he did not have such a license for the District of Columbia [6] and explained the limited purpose of his visit. Despite his explanation, he was placed under arrest by the Capitol Police for violating District of Columbia firearms laws.

After being arraigned, Stein was released on his own recognizance to accompany Senator Kennedy to South America. He later authorized his attorneys to inform the government that he "would formally relinquish" any interest he might have in the weapons.

II

At the outset we must decide whether we have jurisdiction to review, in a pre-trial appeal, the trial court's ruling that Stein was not immune from prosecution under D.C. Code § 6-2375(a) (1981). We hold that we do have such jurisdiction under a narrow but well recognized exception to the rule against appeals from non-final orders.

By statute this court has jurisdiction of appeals from all final orders and judgments of the Superior Court. D.C. Code § 11-721(a)(1) (1981).[7] The trial court's

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[6] Stein was licensed, however, to use guns and to carry concealed weapons in the State of California, and he had all permits necessary to carry weapons in the countries to be visited on the Senator's trip.

[7] We also have jurisdiction of appeals from certain interlocutory orders under D.C. Code § 11-721 (a)(2) and (3) (1981), but neither of those provisions applies to this case.

order in this case is obviously not final, since the charges against Stein are still pending, and no ultimate judgment on the merits has been entered. The Supreme Court, however, has created a narrow exception to the rule of finality as a predicate for appellate jurisdiction. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court recognized a "small class" of appealable, albeit non-final, orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The courts of the District of Columbia have long recognized this "collateral order" doctrine. *See, e.g., United States v. Harrod*, 428 A.2d 30 (D.C. 1981) (en banc); *Choco v. United States*, 383 A.2d 333 (D.C. 1978); *United States v. Perkins*, 140 U.S. App. D.C. 76, 433 F.2d 1182 (1970).

The requirements of the doctrine are stringent and difficult to meet. In criminal cases especially, the collateral order exception to the final judgment rule is strictly construed:

> To come within this "narrow exception" . . . a trial court order must, at a minimum, meet three conditions. First, it "must conclusively determine the undisputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment."

Flanagan v. United States, 465 U.S. 259, 265 (1984) (citations omitted). We hold that the trial court's rejection of Stein's immunity claim meets all three of these tests.

The first requirement, whether a disputed question has been conclusively determined, has been satisfied in this case. The disputed question is whether Stein is immune from prosecution under D.C. Code § 6-2375 (a). The trial court has conclusively ruled on that question, and its ruling has become the law of the case, not subject to reconsideration before final judgment (with certain limited exceptions not pertinent here). *See Kaplan v. Pointer*, 501 A.2d 1269, 1270 (D.C. 1985) (citing cases); *United States v. Allen*, 337 A.2d 512 (D.C. 1975). The second requirement has also been satisfied: the challenged ruling on the immunity issue is completely separate from the merits of the criminal prosecution. The Supreme Court "has recognized that a question of immunity is separate from the merits of the underlying action . . . even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Mitchell v. Forsyth*, 472 U.S. 511, 528-529 (1985) (footnote omitted).

The government argues that the immunity issue is not separate from the merits because the statute on which Stein relies, D.C. Code § 6-2375 (a), provides a defense on the merits of the criminal charges. The government's brief states that the "essential protection" of the statute is "against *conviction* of one whose possession was solely in order to surrender the firearm to police custody. . . . Appellant's right to avoid prosecution under § 6-2375 (a), if in fact that right is established, can be vindicated by an acquittal at trial or on appeal." [Emphasis in original.] This argument ignores the plain language of the statute. Section 6-2375 (a) expressly provides that compliance with its provisions "shall preclude the arrest and prosecution" of persons who voluntarily surrender their firearms. This provision of the Code does not merely provide a defense to a criminal charge; rather, it "specifically prevents the arrest or

prosecution" of anyone to whom it applies. *Kuhn v. Cissel*, 409 A.2d 182, 186 (D.C. 1979).[8]

This leads us directly to the third requirement of the collateral order doctrine, namely, that the ruling will be effectively unreviewable on appeal from a final judgment. It necessarily follows from what we have just said that this requirement is met here as well. Although it is too late to prevent Stein's arrest, his right to avoid prosecution (if he has such a right) cannot be "vindicated by an acquittal at trial or on appeal," as the government asserts. "When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." *Cohen v. Beneficial Industrial Loan Corp., supra*, 337 U.S. at 546. The Supreme Court's holding in *Mitchell v. Forsyth, supra*, supports our conclusion:

> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

472 U.S. at 526-527 (emphasis in original).[9] The question of whether Stein is immune is "effectively unreview-

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[8] *Kuhn v. Cissel, supra*, involved D.C. Code § 6-1875 (1978 Supp.), which has been recodified as D.C. Code § 6-2375 (1981).

[9] Although the *Mitchell* case involved the issue of qualified immunity rather than absolute immunity from suit, that dis-

able" on appeal from a judgment of conviction because, if he is immune, he has a statutory right not to be tried at all. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Helstoski v. Meanor*, 442 U.S. 500 (1979). His "asserted right to [immunity] is forever lost if not resolved in [his] favor before jeopardy has attached." *Choco v. United States, supra*, 383 A.2d at 334; *accord, Bever v. Gilbertson*, 724 F.2d 1083, 1086 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984).

For these reasons we hold that the trial court's order denying Stein's claim of immunity is immediately appealable as a collateral order, and that we have jurisdiction to review it in this pre-trial appeal.

III

D.C. Code § 6-2375 (a) (1981) provides:

> If a person or organization within the District voluntarily and peaceably delivers and *abandons to the Chief* any firearm, destructive device or ammunition at any time, such delivery shall preclude the arrest and prosecution of such person *on a charge of violating any provision of this chapter* with respect to the firearm, destructive device, or ammunition voluntarily delivered. Delivery under this section may be made *at any police district, station, or central headquarters, or by summoning a police officer to the person's residence or place of business.* Every firearm and destructive device to be delivered and abandoned to the Chief under this section shall be unloaded and securely

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tinction is not relevant to the issue of immediate appealability. *See Mitchell v. Forsyth, supra*, 472 U.S. at 529 n.10.

> wrapped in a package, and, in the case of delivery to a police facility, the package shall be carried in open view. No person who delivers and abandons a firearm, destructive device, or ammunition under this section, shall be required to furnish identification, photographs, or fingerprints. No amount of money shall be paid for any firearm, destructive device, or ammunition delivered and abandoned under this section. [Emphasis added.]

We reject Stein's claim of immunity under this statute because he failed to comply with it in two respects: he did not deliver his weapons "to the Chief," and he did not "abandon" them at the time of delivery. Moreover, even if he were immune, he would be protected from prosecution only for violations of "this chapter," *i.e.*, chapter 23 of title 6 of the District of Columbia Code. Immunity under section 6-2375 (a) is thus limited by the very language of that section; it does not extend to prosecutions for violations of D.C. Code § 22-3204 or 22-3214 (1981), with which Stein is also charged.

A. *Delivery "to the Chief"*

Section 6-2375 (a) requires a person seeking its protection to deliver any firearm "to the Chief . . . at any police district, station, or central headquarters, or by summoning a police officer to the person's residence or place of business." In another section "Chief" is defined for the purposes of chapter 23 of title 6 of the Code, of which section 6-2375 is a part, as "the Chief of Police of the Metropolitan Police Department of the District of Columbia or his designated agent." D.C. Code § 6-2302 (4) (1981). The legislative history states that what became section 6-2375 "provides a mechanism for the lawful surrender or abandoning of any firearm or am-

munition to the Chief or to a Metropolitan police officer." Council of the District of Columbia, Committee on the Judiciary and Criminal Law, Report on the "Firearms Control Act of 1975" at 30 (April 21, 1976). The Metropolitan Police and the Capitol Police are two entirely separate police departments. *Compare, e.g.*, D.C. Code § 4-104 *with* D.C. Code § 9-115 (1981). *See also, e.g.*, D.C. Code § 4-127 (1986 Supp.) (prescribing uniform designs for four police forces, including both the Metropolitan Police and the Capitol Police); D.C. Code § 9-116 (1981) (authorizing the Mayor to detail Metropolitan Police officers to the Capitol Police). Significantly for the purposes of this case, Capitol Police officers are not and have never been designated agents of the Chief of the Metropolitan Police for the purpose of receiving firearms surrendered under D.C. Code § 6-2375 (a).

Conceding this,[10] Stein argues nevertheless that under general agency principles the Capitol Police had the authority to accept the guns and ammunition from him in compliance with the firearms laws. His argument is based on a statute which, he maintains, makes the Capitol Police "designated . . . agent[s] of the state" with the authority to arrest persons for violating any law of the District of Columbia, including the law prohibiting the possession of certain weapons. *See* D.C. Code § 9-115 (1981) (Capitol Police may "make arrests within the United States Capitol Buildings and Grounds for any violations of any law of the United States [or] of the District of Columbia"). Because their agency status, he asserts, allows them to enforce District of Columbia law

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[10] Stein acknowledges in a footnote in his brief that members of the Capitol Police are not designated agents of the Chief of the Metropolitan Police.

by making arrests, it also allows them to enforce the law by acting as recipients of weapons surrendered under section 6-2375 (a).

We reject this argument for two reasons. First, although the Capitol Police have been given express authority under section 9-115 to arrest, they have no such express authority under section 6-2375 (a) to take delivery of guns and ammunition. The statutory language and legislative history explicitly identify the authorized recipient to be the "Chief" or his designated agent, which includes only the Metropolitan Police, not the Capitol Police. Second, we do not read section 9-115 as creating an agency relationship. It gives to the Capitol Police the power to make arrests, but nowhere does it make them agents of the Metropolitan Police (or anyone else) for that purpose. Section 9-115 is an independent grant of arrest power to the Capitol Police, unrelated to any other powers which the Metropolitan Police may have under other statutes or regulations.

In addition to calling for delivery to the Chief of the Metropolitan Police or his designated agent, section 6-2375 (a) also requires that the person in possession of the guns and ammunition deliver them "at any police district, station, or central headquarters, or by summoning a police officer to the person's residence or place of business." The guard desk in the Russell Senate Office Building, which is in a public hallway just inside the entrance, does not meet this requirement. Thus, even if the Capitol Police officer at that desk had been authorized to accept Stein's surrender of the firearms, that surrender could not validly take place there. The conclusion is inescapable that even if Stein's delivery of the weapons were otherwise in accord with the statute (which it was not; see part B, *infra*), he delivered them to the wrong person at the wrong place.

B. *Abandonment*

Section 6-2375 (a) bestows immunity on one who "delivers and abandons" firearms or ammunition to the appropriate police authority. Stein argues that he satisfied this requirement when he placed his guns and ammunition on the guard desk in front of the Capitol Police officer. We disagree. The facts unmistakably show that Stein delivered the guns and ammunition to the officer, but that he did not abandon them.

"Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim, and possession, with the intention of terminating his [or her] ownership, but without vesting it in any other person, and with the intention of not reclaiming future possession or resuming its ownership, possession, or enjoyment." 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 1, at 3-4 (1962) (footnotes omitted). To be legally effective, therefore, an abandonment must be permanent and eternal; the owner must have "utterly and entirely relinquished" all hope and intent of recovering the property. *Id.* at 4 (footnote omitted). A person alleging an abandonment must prove both "an intent to abandon and an act or omission by which such intention is put into effect." *Block v. Fisher*, 103 A.2d 575, 576 (D.C. 1954) (footnote omitted). Proof of that intent, moreover, must be clear and unequivocal. *International Finance Corp. v. Jawish*, 63 App. D.C. 262, 263, 71 F.2d 985, 986 (1934); *see Peyton v. United States*, 275 A.2d 229, 230 (D.C. 1971) (citing cases). Stein presented no such proof to the trial court. On the contrary, Stein's affidavit indicates that he fully intended to retrieve the guns and ammunition from the police officer when he left the building so that he could take them with him on the trip to South America. Even in his brief on appeal he

concedes that "[t]here was no question in the trial court that Stein had the intention of abandoning his weapons to the Capitol Police *until he was ready to leave* the Russell Senate Office Building and the District of Columbia" (emphasis added). This statement is in accord with the affidavit, but it is flatly inconsistent with a claim of abandonment. On the undisputed facts, therefore, we hold that Stein did not abandon the guns and ammunition, as the statute required him to do.

C. *The Limited Scope of Immunity*

Stein asserts not only that he is immune from prosecution under D.C. Code §§ 6-2311 and 6-2361, but that his immunity extends to all the offenses with which he is charged. The plain language of the immunity statute refutes this assertion. Section 6-2375 (a) states that compliance with its provisions "shall preclude the arrest and prosecution of [the person so complying] on a charge of violating *any provision of this chapter*" (emphasis added), referring to the chapter 23 of title 6 of the District of Columbia Code. "This chapter" is the Code's translation of a phrase in the original statute enacted by the Council of the District of Columbia. Section 6-2375 of the Code is derived from section 705 of the Firearms Control Regulations Act of 1975, D.C. Act 1-142, 23 D.C. Reg. 1091 (1976), which became effective as D.C. Law 1-85, 23 D.C. Reg. 2464 (1976). The immunity granted by section 705 was from prosecutions for violations of "this act." 23 D.C. Reg. at 1130. "This act," of course, was D.C. Act 1-142, later to become D.C. Law 1-85, which is now codified as chapter 23 of title 6 of the Code.

Stein maintains that we should nevertheless read the statutory language broadly, construing it as a grant of immunity from prosecution for any firearms offense

when the firearms in question are surrendered in accordance with section 6-2375 (a). He makes various arguments in favor of such a construction, but they all founder on the language of the statute itself. That language is clear and unambiguous, and nothing in the legislative history suggests that it means anything other than what it says. We can only conclude that the statute as written plainly states the intent of the Council to restrict its grant of immunity to violations of the Firearms Control Regulations Act of 1975.

IV

Stein urges us to exercise our "discretion" and consider certain other issues on which the trial court also ruled. The government maintains that we lack jurisdiction to consider these issues in a pre-trial appeal. We agree with the government.

The jurisdiction of this court is not a discretionary matter; either we have jurisdiction or we do not. The case law is absolutely clear that in this instance we have no jurisdiction to entertain Stein's assignments of error other than the one pertaining to his claim of immunity. *Abney v. United States*, 431 U.S. 651, 662-663 (1977); *Gant v. United States*, 467 A.2d 968, 970 (D.C. 1983), *cert. denied*, 466 U.S. 952 (1984); *see also United States v. MacDonald*, 435 U.S. 850 (1978). "The fact that [an] issue . . . is important, or even critical to the disposition of the case, is of no legal consequence in deciding the question of appellate jurisdiction." *Cohen v. Owens & Co.*, 464 A.2d 904, 906 (D.C. 1983). Resolution of the other issues which Stein presses upon us must wait until a final judgment is entered.[11]

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[11] Because appellate review will ultimately be available if Stein is tried and convicted, we deny Stein's alternative re-

V

We hold that we have jurisdiction to review the trial court's denial of Stein's motion to dismiss the indictment on the ground that he was immune from prosecution under D.C. Code § 6-2375 (a) (1981). Even though a final judgment has not yet been entered, that denial is appealable as a collateral order. We further hold that the trial court's ruling on the claim of immunity was correct, and accordingly it is

Affirmed.

MACK, *Associate Judge*, concurring in part, dissenting in part: I concur in Parts I, II, and IV of the majority opinion. However, because I believe that the majority's resolution of ambiguous terms in D.C. Code § 6-2375 (a) (1981) leads to absurd consequences and thwarts the manifest purpose of the statute, I cannot go along with the majority's rejection of Mr. Stein's claim of immunity in Part III.

Charles Stein is a former police captain and presently works as a security specialist and private investigator. Mr. Stein was to accompany Senator Edward M. Kennedy on a tour of South America to ensure the Senator's protection. Mr. Stein went to the Russell Senate Office Building, from where he and the Senator were to depart. He entered the office building and went directly to the Capitol Police officer's desk just inside the entrance. After identifying himself as a security officer for Senator Kennedy, he told the officer that he had two unloaded guns and a bag of ammunition, and asked per-

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quest to treat his brief with respect to these other issues as a petition for a writ of mandamus.

mission to leave them at the desk. The officer asked Mr. Stein if he had a license for the weapons. He replied he did not,[1] and although he tried to explain to the officers the limited purpose of his visit, was placed under arrest by the Capitol Police for violating District of Columbia firearms laws.

Under the reasoning advanced by the majority, Mr. Stein has been placed under arrest for possessing unregistered firearms by officers who could not themselves legally receive into their possession the firearms turned over to them. The majority reaches this strange result by a strained construction of D.C. Code § 6-2375 (a).

D.C. Code § 6-2375 (a) provides:

> If a person or organization within the District *voluntarily and peaceably* delivers and abandons to the Chief any firearm, destructive device or ammunition at any time, such delivery shall preclude the arrest and prosecution of such person on a charge of violating any provision of this chapter with respect to the firearms, destructive device, or ammunition voluntarily delivered. *Delivery under this section may be made at any police district, station, or central headquarters or by summoning a police officer to the person's residence or place of business. . . .* [Emphasis added.]

Because Mr. Stein delivered his weapons to a Capitol police officer instead of a Metropolitan police officer, and allegedly did not intend to permanently abandon them, the majority finds him subject to prosecution.

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[1] Mr. Stein is a resident of the State of California and is licensed to use guns and to carry concealed weapons there.

I. *The Proper Police Officer*

The first sentence of § 6-2375 (a) describes generally the act of voluntary and peaceful delivery of the firearm which would result in immunity from prosecution. The second sentence describes places where delivery may be made. The statute provides for immunity from prosecution following the surrender/abandon of weapons to "*a police officer*" in a wide variety of situations; at *any* police district, station, or headquarters, or even at a person's home or business. D.C. Code § 6-2375 (a) does not identify a specific type of police officer to whom the weapons must be delivered, and there is no indication in the Firearms Protection Act that the statutory term "police officer" is somehow confined to members of the Metropolitan Police Department.

D.C. Code § 6-2375 (a) also provides for surrender of firearms to "the Chief." According to § 6-2302 (4), "the Chief" means "the Chief of Police of the Metropolitan Police Department of the District of Columbia *or his designated agent.*" Just who qualifies as a "designated agent" of the Chief, however, is unclear. Nowhere does the statute indicate that only *Metropolitan* police department members could be "designated agents" of the Chief.

The Capitol Police have been authorized by local statute to make arrests for the very firearms offenses at issue herein, *see* D.C. Code § 9-115.1, and have been designated as exclusive law-and-order custodians of Capitol buildings like the Russell Senate Office Building. *See* D.C. Code § 9-115; 40 U.S.C. § 112a. It is certainly arguable that a police officer who has been officially designated as an agent of the state for purposes of making arrests under the firearms law in these limited circumstances should have his agency status carried over into effecting compliance with other interrelated provisions of those

very same firearms laws in the same limited circumstances. It is eminently reasonable, in any case, that a citizen would believe that such a police officer had the authority to accept surrendered weapons pursuant to the statute.[2]

II. *Legislative History*

The majority concedes that the statutory language "designated agent" and "police officer" is not, on its face, clear, and resorts to searching the legislative history to ascertain who is an authorized recipient of surrendered/abandoned weapons. A statement in the committee report on the Firearms Control Act of 1975 to the effect that the provision would allow the lawful surrender or abandoning of any firearm or ammunition to the Chief or to a Metropolitan police officer is the majority's sole support for its conclusion that Mr. Stein is subject to prosecution because he surrendered his firearms to a Capitol police officer.

In my view, a single reference in the legislative history to the Metropolitan Police Department is insufficient evidence of legislative intent, given the absurd results such reliance generates and the manifest purpose of the statute. "It is a 'well-established principle of statutory interpretation that the law favors rational and sensible construction' . . . [U]nreasonableness of the result pro-

[2] I note that it is not only the average citizen who might take for granted that Capitol Police officers (who are authorized to make arrests for the firearms offenses at issue here) were authorized recipients of firearms under the statute. When Mr. Stein attempted to determine from the MPD whether the Capitol Police were, in fact, designated agents of the Chief for these purposes, he was met with the following responses from three different individuals: "I think so, but I'm not really sure"; "I don't know"; and "I don't know."

duced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." 2A SUTHERLAND ON STATUTORY CONSTRUCTION, § 45.12 at 54 (Sands 4th ed. 1985) (citations omitted). I simply cannot believe that the City Council, in drafting § 6-2375 (a), could have intended the arrest and prosecution of someone in Mr. Stein's situation.

III. *Purpose of the Firearms Control Act Immunity Provision*

The City Council's primary purpose in enacting the Firearms Control Act of 1975 was "to reduce the potentiality for gun-related crimes and gun-related deaths occurring in the District of Columbia." [3] The prosecution of Mr. Stein—who was fully qualified to carry his weapons elsewhere, and was in the District for a very limited time and purpose—for failing to properly assess the distinction between a Capitol police officer and a Metropolitan police officer seems to me an unjust result (and, I might add, a waste of the government's resources). The hypertechnical statutory interpretation supported by the majority does nothing to promote the purposes of the statute. The public policy behind § 6-

[3] The City Council enacted D.C. Code § 6-2375 (a) against the backdrop of a body of well-established caselaw providing an affirmative defense to one who possesses a pistol "for the purpose of turning it over to *law enforcement authorities*," D.C. Criminal Jury Instruction No. 4.815B (emphasis added), or "furthering the aims of *law enforcement*." *Id.* (emphasis added). The criminal procedure chapter of the D.C. Code defines "law enforcement officer" to mean "an officer or member of the Metropolitan Police Department of the District of Columbia, *or of any other police force operating in the District of Columbia*, or an investigative officer or agent of the United States." D.C. Code § 23-501 (2) (emphasis added).

2375 is obviously to encourage individuals to surrender firearms to responsible police authorities so that those firearms will not be used in the District of Columbia. Nothing which Stein did would undermine that purpose. In fact, prosecuting Stein for choosing the wrong police officer to surrender his weapons to only works to discourage other citizens from being so forthcoming in the future.

IV. *Eternal Abandonment*

The majority's conclusion that § 6-2375 (a) requires a permanent abandonment is ostensibly based on the "plain language" of the statute. A statute's "language is plain" only if it "admits of no more than one meaning." *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979) (citation omitted). The definition of "abandon" admits of several different meanings. Our decision that Mr. Stein is or is not subject to prosecution should not turn upon a definition of abandonment as meaning "eternal abandonment" when the term is also defined to mean a less than permanent surrender ("to give up, or cease to use"). *See* BLACK'S LAW DICTIONARY (5th ed. 1979).[4]

" 'The literal wording of a statute is a primary index but not the sole index to legislative intent. It cannot prevail over strong contrary indications in the legislative history *or so as command an absurd result.*' " *Citizens Association of Georgetown v. Zoning Commission*, 392 A.2d 1027, 1033 (D.C. 1978), quoting *Lange v. United States*, 143 U.S. App. D.C. 305, 307-08, 443 F.2d 720,

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[4] "Abandon. To desert, surrender, forsake, or cede. To relinquish or give up with intent of never again resuming one's right or interest. To give up or to cease to use. . . ." BLACK'S LAW DICTIONARY 2 (5th ed. 1979).

722-23 (1971) (footnotes omitted; emphasis added). *See Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) ("whenever possible, the words of a statute are to be construed to avoid 'obvious injustice' "); *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 65 (D.C. 1980) (" 'the literal meaning of a statute will not be followed when it produces absurd results.' ") (quoting *District of Columbia National Bank v. District of Columbia*, 121 U.S. App. D.C. 196, 198, 348 F.2d 808, 810 (1965)).[5]

Both the legislative history and the underlying purposes of the statute support a broad interpretation of the term "abandonment." Legislative history shows the term "abandonment" was used interchangeably with other terms. For example, § 6-2375 is discussed in terms of allowing for (1) the "surrender" or "the voluntary surrender" of firearms and ammunition; (2) "the lawful surrender *or* abandoning of any firearm or ammunition; and (3) an individual to voluntarily and peaceably sur-

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[5] *See also* 2A SUTHERLAND ON STATUTORY CONSTRUCTION, § 45.12 at 54 (Sands 4th ed. 1985) ("[D]eparture from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question.").

The purpose of reducing the potential of gun-related crimes in the District of Columbia is not furthered by forcing a security specialist who has lawfully acquired and possessed firearms in another jurisdiction for use in the course of lawful employment, to make an irrevocable gift of these firearms to the Metropolitan police when he surrenders them pursuant to a temporary entry. The majority's interpretation of "abandonment" comes close to that of "forfeiture"—*i.e.*, a result to be expected following misfeasance, crime, negligence, or omission. Mr. Stein did everything that he could do in an effort to comply with the law.

render weapons and ammunitions." Firearms Control Regulation Act of 1975 (Council Act No. 1-142), Hearing and Disposition Before the Committee On The District of Columbia, House of Representatives, 94th Cong., 2d Sess. (August 25, 1976) at pp. 32, 40 & 66. Moreover, the interpretation of "abandon" as not necessarily an "eternal" abandonment is fully consistent with the City Council's primary purpose in enacting the Firearms Control Act of 1975. Its purpose was "to reduce the potentiality for gun-related crimes and gun-related deaths occurring *in the District of Columbia*" (emphasis added). This purpose will be as fulfilled by requiring an individual to abandon his weapons for as long as he is in the District of Columbia as it will be by requiring permanent abandonment.[6]

V. *Conclusion*

The Supreme Court has ruled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). I feel that the majority's analysis relies far too heavily on a hypertechnical approach to the interpretation of ambiguous statutory language, generating an absurd and harsh result. To hold out a promise of immunity to citizens surrendering their firearms only to renege on that promise based on a narrow construction

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[6] The majority's argument that, in any case, Stein did not deliver his weapons to a "police facility" is not persuasive. The statute provides not only for the surrender of weapons to any police district, station, or central headquarters, but also provides for an alternative surrender of one's weapons to a police officer [at] the person's residence or place of business. As Senator Kennedy's employee, the Russell Senate Office Building was plainly Stein's "place of business" in the District of Columbia on January 7, 1986.

of ambiguous statutory language puts this court in danger of collaborating in the "sanction [of] the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438 (1969); *accord*, *Cox v. Louisiana*, 379 U.S. 559, 571 (1965). The underlying purposes of § 6-2375 are best served by permitting an interpretation befitting the broad language of the statute, and allowing Mr. Stein's relinquishment of his weapons to a Capitol police officer to render him immune from prosecution.

I respectfully dissent.

APPENDIX B

THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
v.	:	Criminal Action No. M-220-86
CHARLES STEIN,	:	
Defendant.	:	

Washington, D.C.

TRANSCRIPT OF PROCEEDINGS
MARCH 27, 1986, pp. 99-100

THE COURT: Okay. All right. Motion for -- motion to dismiss will be denied.

With reference to the immunity, I don't think the immunity applies. That's the immunity here in Title 6, section 2375. That is this voluntary surrender and abandonment. I don't think that applies in this case for two reasons.

One, I think that under my reading of this statute, it's not ambiguous, that the

surrender has got to be to the metropolitan police department or someone designated by the chief of police of the metropolitan police department. And I don't think you can do it just by surrendering it to Capitol Hill police.

Okay, and the third reason -- I mean, the second reason that I feel that that abandon -- I mean, the immunity does not apply is that there has got to be an abandonment; not just a surrender, and an abandonment.

In my opinion, abandonment would be redundant unless it -- under the statute unless it related to the state of mind of the person who is surrendering the weapon. What was -- was -- did he do so with an intent to abandon, and not whether he was just as a practical matter not going to ever get it back.

And it's clear from his own affidavit that Mr. Stein had no intention of

abandoning the weapon. He just wanted to leave it there fore safe keeping until he had finished his business inside the Senate building. So, I don't think he had any intent to abandon it.

APPENDIX C

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 86-776

CHARLES J. STEIN,
Appellant, M-220-86

v. FILED 11/19/87

UNITED STATES,
Appellee.

ORDER

It appearing that appellant has filed a petition for rehearing or rehearing en banc, it is

ORDERED that appellee, within 20 days from the date of this order, file a response (ten copies) thereto.

BY THE COURT:

WILLIAM C. PRYOR
Chief Judge

APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 86-776

CHARLES J. STEIN,

Appellant, M-220-86

v. FILED 1/14/88

UNITED STATES,

Appellee.

BEFORE: Pryor, Chief Judge; *Mack, Newman, Ferren, Belson, *Terry, *Rogers, and Steadman, Associate Judges.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that a majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied

PER CURIAM

Associate Judges Mack, Newman, and Ferren would grant rehearing en banc.

APPENDIX E

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 86-776

CHARLES J. STEIN,

Appellant, M-220-86

v. **FILED 3/10/88**

UNITED STATES,

Appellee.

BEFORE: Mack, Terry, and Rogers, Associates Judges.

ORDER

On consideration of the motion of appellant for stay of the mandate pending his filing of a petition for writ of certiorari, treating it as a motion to recall the mandate, and the opposition thereto, it is

ORDERED that the motion is granted and the mandate of this court issued January 21, 1988, is hereby deemed recalled.

PER CURIAM